IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LESHAWN JAMES MCCLAIN,
Appellant.

No. 2 CA-CR 2013-0158
Filed March 18, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20123450001
The Honorable Richard D. Nichols, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer[1] concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, Leshawn McClain was convicted of possession of a dangerous drug, possession of a narcotic drug, and possession of drug paraphernalia. On appeal, he argues the trial court erred by denying his motion to suppress evidence because his initial stop was unlawful, and by admitting into evidence his statement to a police officer that he was a heroin user. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Newnom*, 208 Ariz. 507, ¶ 2, 95 P.3d 950, 950 (App. 2004). After receiving a citizen's report that her truck had been stolen or borrowed and not returned, Tucson City Police Officer Dustin Dial observed McClain driving the truck and "flagged him into the parking lot." McClain parked far away from where Dial was in the parking lot, exited the vehicle with a blue case in his hands, ran to the side of a nearby building, and then returned to the vehicle without the case. After resolving the initial basis for the stop, Dial asked McClain if he could search him and McClain allowed it. Dial found a marijuana pipe in McClain's pocket and placed him under arrest. Dial then retrieved the blue case, which contained marijuana, methamphetamine, and heroin.

¶3 Dial was charged with and convicted of possession of a dangerous drug, possession of a narcotic drug, and possession of

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

drug paraphernalia. He was sentenced to presumptive, concurrent terms of imprisonment, the longest of which was ten years.

Initial Stop

¶4 McClain first argues the trial court erred by denying his motion to suppress evidence resulting from the stop, which he claims was unlawful because it was not supported by reasonable suspicion of criminal activity. McClain contends that the pipe the officer found in his pocket and the drugs found in the blue case should have been suppressed as "fruits of that illegal stop."

¶5 When reviewing a trial court's denial of a motion to suppress based on an alleged Fourth Amendment violation, we review only the facts adduced at the suppression hearing. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). "We defer to the trial court's factual findings, including findings on credibility and the reasonableness of the inferences drawn by [police] officer[s], but we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusions." *State v. Teagle*, 217 Ariz. 17, ¶ 19, 170 P.3d 266, 271 (App. 2007); *see also State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000).

¶6 "An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment." *State v. Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d 954, 956 (App. 2008). "[A] police officer may make a limited investigatory stop in the absence of probable cause[, however,] if the officer has an articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity." *Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d at 271-72. "Although 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory detention." *Id.* ¶ 25. "In reviewing the totality of the circumstances, we accord deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious activities." *Id.* ¶ 26. "The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001).

¶7 Before stopping the truck, Dial spoke with a resident of the apartment complex, who stated that the vehicle "was in her name" and that her son had told her it had been "stolen by [McClain], but . . . she believed that [her son] actually lent the vehicle to him instead." In either circumstance, she complained McClain had "fail[ed] to return" it. After relating this information to Dial, the resident observed the truck driving down an adjacent road, said "there's the truck," and Dial then "[waved] the car over." Dial testified that McClain "was not free to leave" but that he was unsure whether he was investigating "an embezzled vehicle, a stolen vehicle, or even if it was just a civil matter." After Dial's testimony at the suppression hearing, the trial court denied McClain's motion, stating that the "stop and detention of [McClain was] justified based on contact with the citizen who gave [Dial] the information she did about the vehicle," but adding that it did not find "the officer had any reasonable suspicion that the defendant was engaged in any criminal activity with the exception of possibly possessing the vehicle without the permission of the owner."

¶8 Based on the information Dial had before he stopped McClain, the trial court did not err in denying the motion. Dial was confronted with a concerned resident who provided information that her truck either had been lent and not returned or had been stolen outright, and he then actually observed the truck driving down the road—away from the person who claimed to have title. Based on the resident's statements, which Dial apparently found credible, Dial could reasonably suspect either a theft or unlawful use of a vehicle was under way, and that, at the very least, more information was needed. *See* A.R.S. §§ 13-1803(A)(1) (unlawful to knowingly take unauthorized control of vehicle); 13-1814(A)(1) (unlawful to control other person's vehicle with intent to permanently deprive); *State v. O'Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d 325, 326 (2000) ("In deciding whether the police have a particularized and objective basis for suspecting that a person is engaged in criminal activity, we look at the 'whole picture.'"). Although Dial did not have a great deal of information, he had enough to have the "minimal, objective justification" the law requires for such a stop. *See Teagle*, 217 Ariz. 17, ¶ 25, 170 P.3d at 272. His actions were

reasonable. *Knights*, 534 U.S. at 118. Accordingly, the court did not err in denying the motion to suppress.

¶9 McClain also argues that the search and seizure of the blue camera case containing the drugs was unlawful because it was not made pursuant to a valid search incident to arrest. However, he did not argue this basis for suppression either in his motion or at the hearing below, and therefore has forfeited the argument on appeal absent fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008). But, because he does not argue the alleged error is fundamental, he has waived the argument on appeal. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Evidence of Heroin Use

¶10 McClain next argues the trial court erred by allowing Dial to testify that McClain admitted he was a heroin user. He claims the testimony's probative value was outweighed by its prejudicial impact. We review a trial court's ruling on admission of other act evidence for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007). We view "the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *State v. Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *quoting State v. Castro*, 163 Ariz. 465, 473, 788 P.2d 1216, 1224 (App. 1989).

¶11 Generally, "evidence of other bad acts is not admissible to show a defendant's bad character." *State v. Aguilar*, 209 Ariz. 40, ¶ 9, 97 P.3d 865, 867 (2004); Ariz. R. Evid. 404(a). But such evidence "'is admissible when it is offered for any relevant purpose,'" such as proof of "intent, plan, knowledge, identity, or absence of mistake." *Aguilar*, 209 Ariz. 40, ¶ 10, 97 P.3d at 868, *quoting* Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 84 (1991); *see also* Ariz. R. Evid. 404(b). For example, our supreme court has found no error in the admission of testimony that "trackmarks" on a defendant's arm indicated he was a frequent drug user, where the evidence was relevant to his knowledge of the nature of the drugs in question and

his intent to possess them. *State v. Mosley*, 119 Ariz. 393, 399, 581 P.2d 238, 244 (1978).

¶12 Pursuant to A.R.S § 13-3407(A)(1), a person may not knowingly "[p]ossess or use a dangerous drug." Similarly, pursuant to A.R.S. § 13-3408(A)(1), a person may not knowingly "[p]ossess or use a narcotic drug." A person possesses a dangerous or narcotic drug if he or she "knowingly . . . ha[s] physical possession or otherwise . . . exercise[s] dominion or control over property." A.R.S. § 13-105(34). "[B]oth knowledge and possession may be shown by circumstantial evidence." *State v. Hull*, 15 Ariz. App. 134, 135, 486 P.2d 814, 815 (1971).

¶13 At trial, the state was required to show McClain knowingly possessed the drugs in the blue case. McClain's defense was that he did not know the drugs were in the blue case. Viewing the evidence in the light most favorable to the state, *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518, McClain's admission that he was a heroin user was circumstantial evidence tending to prove he had knowledge the drugs were in the blue case and had exercised dominion and control over them. *See Mosley*, 119 Ariz. at 399, 581 P.2d at 244; Rule 404(b). Because the evidence was offered for a relevant purpose, and not to prove McClain's bad character, the trial court did not abuse its discretion in ruling it was admissible. *See Aguilar*, 209 Ariz. 40, ¶ 10, 97 P.3d at 868.

¶14 McClain also appears to argue, however, that the testimony was inadmissible pursuant to Rule 403, Ariz. R. Evid., because it was "extremely prejudicial, casting . . . McClain as a person who uses heroin, with all of the deep-seated negative connotations of drug addiction that are widely held." Even if relevant and admissible, other act evidence must undergo Rule 403 analysis. *State v. Terrazas*, 189 Ariz. 580, 583, 944 P.2d 1194, 1197 (1997). Because "[t]he trial court is in the best position to balance the probative value of challenged evidence against its potential for unfair prejudice . . . it has broad discretion in deciding the admissibility" of the evidence. *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

¶15 Evidence of McClain's drug use likely was harmful to his defense, "but not all harmful evidence is unfairly prejudicial." *See State v. Lee*, 189 Ariz. 590, 599, 944 P.2d 1204, 1213 (1997). "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Harmful but relevant evidence is not unfairly prejudicial where the prosecution only minimally refers to the evidence, does not "belabor" the point to the jury, and the defendant does not request a limiting instruction. *See State v. VanWinkle*, 230 Ariz. 387, ¶ 24, 285 P.3d 308, 314 (2012).

¶16 During trial, the state's reference to McClain's admission was minimal. On direct examination, Dial's only testimony on the subject was, "I asked him when the last time was he used heroin, and he just said he was a heroin user." During the state's redirect examination, the officer testified on the subject only to state that it is not illegal to admit to using heroin. And the prosecutor did not bring up McClain's heroin use to the jury in closing arguments. Moreover, McClain did not request a jury instruction to limit the jury's consideration of the evidence and does not argue on appeal that the trial court erred in failing to provide one. Consequently, McClain has not demonstrated the testimony, although likely harmful, was unfairly prejudicial. *See VanWinkle*, 230 Ariz. 387, ¶ 24, 285 P.3d at 314. The court therefore did not abuse its broad discretion in ruling the probative value of this evidence was not substantially outweighed by the potential for unfair prejudice. *See Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d at 946; *Harrison*, 195 Ariz. 28, ¶ 21, 985 P.2d at 518.

Criminal Restitution Order

¶17 Although neither party has raised this issue, we have discovered the sentencing minute entry provides that the "fines, fees and/or assessments" the court had imposed were "reduced to a Criminal Restitution Order [CRO]." But as this court repeatedly has determined, based on A.R.S. § 13-805(C), "the imposition of a CRO [on fines, fees and assessments] before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz.

561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009); *but see State v. Cota*, No. 2 CA-CR 2013-0185, ¶¶ 1, 16, 2014 WL 722609 (Ariz. Ct. App. Feb. 25, 2014) (discussing the amendments to § 13-805 effective April 1, 2013, and reaffirming *Lopez* except in cases where defendant ordered to pay restitution to victim). This portion of the sentencing minute entry is not authorized by statute, and the CRO must be vacated. *Cota*, 2014 WL 722609, ¶ 16.

Disposition

¶18 For the foregoing reasons, we vacate the CRO but otherwise affirm McClain's convictions and sentences.